D. R. JOHNSON LUMBER CO.

IBLA 87-265 Decided January 19, 1989

Appeal from a decision of the District Manager, Roseburg District, Oregon, Bureau of Land Management, holding communications site right-of-way OR-11303 for termination.

Appeal dismissed in part; decision affirmed.

1. Appeals: Jurisdiction--Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Timely Filing

   An administrative appeal must be filed within 30 days of receipt of the decision from which an appeal is taken. 43 CFR 4.411. The timely filing of an administrative appeal is jurisdictional and the failure to file timely mandates dismissal of the appeal.

2. Appraisals--Communication Sites--Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Appraisals--Rights-of-Way: Cancellation

   BLM properly holds a communications site right-of-way grant for termination where the holder failed to pay the annual rental charges for the first and second years of the grant within 30 days following notification of BLM's determination of the fair market rental value of the grant for those years.

APPEARANCES: Ronald S. Yockim, Esq., for appellant.

OPINION BY ADMINISTRATIVE JUDGE KELLY

The D. R. Johnson Lumber Company (Johnson) has appealed from a January 23, 1987, decision of the District Manager, Roseburg District, Oregon, Bureau of Land Management (BLM), holding its communications site right-of-way, OR-11303, for termination.

The communications site at issue in this appeal is located on Canyon Mountain in sec. 3, T. 31 S., R. 5 W., Willamette Meridian, Douglas County, Oregon. The site has been in use since approximately 1929 when it was withdrawn for an air navigation site (ANS). The use of the ANS has been abandoned, the withdrawal has been revoked, and the ANS tower has been sold to private parties.

The record in this case and in trespass action LUR-55, against Johnson, shows that Johnson's use of the communications site has been documented
to September 18, 1967. A notice of trespass was issued to Johnson on November 23, 1970. The trespass action was closed on January 10, 1974, after Johnson paid all outstanding trespass charges and filed an applica-tion for right-of-way.

Johnson's September 25, 1973, right-of-way application was filed
with BLM pursuant to the Act of March 4, 1911, as amended, 43 U.S.C. | 961 (1970) (repealed by section 706(a) of the Federal Land Policy and Manage-ment Act of 1976 (FLPMA), P.L. 94-579, 90 Stat. 2793 (1976), effective October 21, 1976). Johnson sought the right-of-way in order to continue using the facilities it had already located at the Canyon Mountain site.
In a September 19, 1973, cover letter accompanying the right-of-way application, Johnson stated that, based upon a discussion with a BLM employee,
it had "decided to make payment in advance for the full 50 years' rental. Therefore, enclosed you will find our check for $260, which includes the $10 application fee, and the 50 years' rental."

The right-of-way was not finally approved until October 29, 1985. During the interval, on November 4, 1974, BLM conducted an appraisal in order to determine the fair market rental value of the communications site situated on Canyon Mountain, using the comparable lease method of appraisal. Based on this appraisal, BLM concluded that the appropriate annual fair market rental value for the communications site was $350, as of November 4, 1974. BLM then apportioned the annual rental among Johnson and the other applicants for rights-of-way on Canyon Mountain depending on whether or not they shared the use of a facility at the communications site. Those sharing a facility were to be charged according to their proportionate share of its use; those not sharing a facility, like Johnson, were each to be charged the full annual rental of $350. In a November 24, 1976, memorandum to the State Director, the District Manager reported that "[a]ll the users have been advised that they are now on a $350 a year pro-rate rental fee."

On July 29, 1981, BLM prepared a land report in order to determine the appropriate course of action on Johnson's pending application. The land report recommended that BLM issue a right-of-way grant for the use of an existing BLM structure situated on the other side of the ANS tower for the location of Johnson's radio relay equipment, rather than for the use of the structure then occupied by Johnson. The recommendation was approved by the District Manager on July 29, 1981.

By letter dated August 11, 1981, the District Manager requested Johnson to inform BLM whether it agreed to remove its existing building and move
its radio relay equipment into the BLM building, and noted that this course of action would be advantageous to Johnson in terms of rental due. Subsequently, when Johnson failed to respond, by letter dated June 7, 1983, the Area Manager, South Umpqua Resource Area, Oregon, BLM, essentially requested Johnson to decide whether it intended to upgrade its existing facility, which BLM had determined posed certain fire and safety hazards, or to place its equipment in the BLM building. Johnson eventually indicated his preference to upgrade the existing facility and in an August 5, 1983, memorandum

to the District Manager, a BLM realty specialist recommended issuing a right-of-way for the use of the existing location, rather than the BLM building. The District Manager concurred in that recommendation.

By notice dated July 30, 1985, the District Manager, noting that the fire and safety hazards had been eliminated, offered a right-of-way grant to Johnson for its existing facility on Canyon Mountain, pursuant to FLPMA. The District Manager stated that the right-of-way would be for a term of 15 years "at fair market value" and that he was accepting the $250 originally submitted only as "advance rental" for the 1985-1986 rental year, "subject to adjustment after appraisal." 1/ The District Manager also addressed Johnson's assertion in its September 1973 cover letter accompanying the right-of-way application that the $250 constituted "payment in advance for the full 50 years' rental":

> The Bureau of Land Management does not recognize the voluntary submission of monies to the United States as an "agreement".
> The following reasons are offered in explanation:
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> l. The monies submitted reflect the minimum rental rate required by the United States of a subsequent (additional) user of existing, authorized, structures. The D.R. Johnson Lumber Co. facilities did not qualify as a subsequent use at the date of application, September 25, 1973, nor does it now qualify as a subsequent use. Full fair market value rental is therefore required.
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> 2. The fifteen year tenure offered is consistent with tenure offered for similar radio facilities. We should also note that the right-of-way is renewable at your discretion.

The District Manager required Johnson to execute and return the right-of-way grant within 2 weeks of receipt thereof or the right-of-way application would be rejected without further notice.

On October 7, 1985, Johnson submitted the executed right-of-way grant. BLM executed the grant on October 29, 1985, thereby authorizing the use of a 50- by 50-foot area within lot 8, sec. 3, T. 31 S., R. 5 W., Willamette Meridian, Douglas County, Oregon, for radio relay purposes, including the location, construction, and maintenance of a radio equipment shelter and two free-standing antenna masts and the location of an antenna on an existing tower.

BLM subsequently conducted an appraisal of Johnson's communications site right-of-way on August 11, 1986, using the comparable lease method of appraisal. The BLM appraiser primarily relied on three communications site

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1/ The offered right-of-way grant contained language specifically acknowledging payment of "an advanced rental of [$250] for the first year of this grant" and stating that "[r]ental collected is based on an estimate and the charge may be adjusted whenever necessary to collect fair market value for uses authorized by this grant."

leases which were considered fairly comparable to the subject right-of-way in terms of coverage and the availability of power and access. 2/ These leases had annual rental charges as of 1986 ranging from $1,340 to $1,815. The subject right-of-way was considered to be "most similar" to lease No. 1 having an annual rental of $1,340 (Appraisal Report at 13). Accordingly, the BLM appraiser concluded that the annual fair market rental value of the subject right-of-way was $1,350 as of June 25, 1986. The Chief, Appraisal Staff, approved the appraisal on September 10, 1986.

On September 11, 1986, Johnson paid an additional $250 in response to a September 2, 1986, BLM notice of rental due on October 28, 1986, for the second year of the right-of-way grant. There is no indication that Johnson objected to that required payment.

By decision dated December 1, 1986, the District Manager notified Johnson that BLM had determined the annual fair market rental value of the subject right-of-way to be $1,350 and that Johnson owed annual rental charges for the first and second years of the grant less $500 in advance rentals already paid or a total of $2,200. Johnson was billed for that amount. The December 1 decision advised appellant of its right to appeal within 30 days of receipt of the decision, and the record shows that the decision was received on December 2. However, appellant did not respond to the decision until January 21, at which time it filed a letter with BLM setting forth its arguments against the rental increase. That letter also stated appellant's response was "slightly late" because "[d]uring the crunch that we have experienced during this last month your letter was not submitted to the proper corporate counsel."

In his January 23, 1987, decision holding the right-of-way for termination, the District Manager, noting that Johnson had failed to pay the $2,200 in rental previously determined to be due, stated that this amount was due immediately and that "[f]ailure to submit the monies immediately shall be considered a default and action may be taken to terminate the right-of-way grant." On January 26, 1987, Johnson filed its notice of appeal with BLM, stating that it "hereby files this 'Notice of Appeal' of your decision of December 1, 1986, as amended and republished on January 23, 1987."

[1] The first issue to be addressed is whether Johnson's January 26 notice of appeal constitutes a timely appeal of BLM's December 1 decision. Under 43 CFR 4.411, an administrative appeal must be filed within 30 days of receipt of the decision from which an appeal is taken. The timely filing

2/ In assessing what factors were necessary to assure comparability between the subject right-of-way and other communications site leases, BLM reviewed the impact of various factors including size, lease terms, equipment type, coverage, and availability of power and access on rental value by looking at six additional communications site leases. Only those factors considered to have an impact on value with respect to the subject right-of-way were relied upon in selecting comparable leases and adjusting for any differences between those leases and the subject right-of-way.

of an appeal is jurisdictional and the failure to file timely mandates dismissal of the appeal. Ahtna, Inc., 100 IBLA 7 (1987). In the case at hand, Johnson does not dispute the fact that no response was filed to BLM's December 1 decision within the required 30-day period. Instead, Johnson's notice of appeal characterizes such decision as having been "amended and republished" by BLM's January 23 decision, thus indicating that the December 1 decision was not a final decision.

We do not find Johnson's characterization of the December 1 decision convincing. There is no evidence in the record indicating that this decision was either amended or republished. The December 1 decision stated in unequivocal terms that the appraisal had been completed and that the balance due for rental was $2,200. The decision provided for a right of appeal and specifically advised that in taking an appeal, "there must be strict compliance with the regulations." On the other hand, the December 23 decision held the right-of-way for termination and advised that absent the immediate payment of the balance due, "action may be taken to terminate the grant." The critical distinction between these two decisions is that the December 1 decision was a final, appealable decision as to valuation of the grant, while the December 23 decision addressed the action of termination as a remedy for the failure to pay.

Accordingly, in the absence of a timely appeal from the December 1 decision, we must conclude that it became final for the Department. Thus, to the extent that Johnson seeks to appeal that decision, Johnson's appeal must be dismissed. Further, we conclude that Johnson is not entitled to raise any questions regarding BLM's determination of the annual fair market rental value for right-of-way OR-11303. See Turner Brothers, Inc. v. OSMRE, 102 IBLA 111, 121-22 (1988). The propriety of BLM's December 23 decision, however, is still at issue. For the reasons set forth below, we conclude that BLM's decision of December 23 should be affirmed. We also conclude that, even if Johnson's appeal of the December 1 decision had been timely, we would still affirm that decision.

Appellant's underlying assertion in this case is that BLM, more than 10 years prior to offering to grant a right-of-way in 1985, "originally leased" the subject parcel of land to appellant for 50 years, subject to
a "one time payment of $250" (Letter to District Manager from Ronald S. Yockim, counsel for appellant, dated Jan. 21, 1987, at 1). Further, appellant contends that it originally placed its radio equipment on Canyon Mountain "[o]n or about September, 1973" in reliance on statements by BLM employees that it would be granted a 50-year lease upon payment of $250 (Statement of Reasons (SOR) at 1). 3/

3/ The record belies appellant's assertion that it originally placed radio equipment on Canyon Mountain in September 1973. Rather, the record shows that appellant placed a "small building containing the radio equipment on Canyon [Mountain] in trespass * * * [on] September 18, 1967" (May 22, 1975, Addendum Land Report at 1; see also Abstract of D. R. Johnson Trespass). In fact, in its right-of-way application, appellant stated: "The original use of the [communications] site commenced in 1967."

The only indications in the record that appellant was ever informed by a BLM employee that it would be issued a 50-year right-of-way grant upon the making of a one-time payment in the amount of $250, are the following statements in appellant's September 1973 cover letter accompanying its right-of-way application: "After discussing the matter with Mr. Lyman Brigham of the Roseburg District Office, we have decided to make payment in advance for the full 50 years' rental. Therefore, enclosed you will find our check for $260, which includes the $10 application fee, and the 50 years' rental." These statements clearly do not assert that Mr. Brigham or any other BLM employee specifically stated that BLM would issue a 50-year right-of-way grant upon the making of a one-time $250 payment.

However, even if we concluded that a BLM employee made such a statement, we could not hold that BLM was thereby bound to issue a right-of-way grant under those terms. Until the issuance of a right-of-way grant, BLM retains the discretionary authority either to reject a right-of-way application or to issue a right-of-way grant subject to suitable terms and conditions. Dale Ludington, 94 IBLA 167, 172 (1986); Donald R. Clark, 56 IBLA 167, 169 (1981). Furthermore, at the time BLM issued the grant to appellant, sec-tion 504(g) of FLPMA, as amended, 43 U.S.C. | 1764(g) (Supp. III 1985), which had superseded the Act of March 4, 1911, specifically required the holder of a right-of-way to "pay annually in advance the fair market value thereof as determined by the Secretary." See also 43 CFR 2803.1-2(a). The requirement to pay fair market value was also contained in applicable regulations in effect at the time appellant filed its right-of-way application. See 43 CFR 2802.1-7(a) (1972). Thus, BLM properly issued communications site right-of-way OR-11303 to appellant subject to annual payment of fair market rental value where that was mandated by statute, irrespective of whatever informal arrangement had been discussed prior thereto.

Moreover, the record establishes that BLM did not issue a right-of-way grant to appellant until October 29, 1985. That grant specifically states that appellant had paid an "advanced rental of [$250] for the first year
of this grant" and that the rental collected was an estimate which "may be adjusted whenever necessary to collect fair market value." BLM subsequently determined the annual fair market rental value to be $1,350 as of October 2, 1985, based on its August 1986 appraisal.

Even if we had allowed appellant's challenge to BLM's fair market rental value determination, we would still affirm BLM's determination. Appellant contends that BLM's rental value translates to a per acre rental value of $23,522 or a capitalized per acre sale value of $240,000. Noting that recent sales had disclosed per acre values for industrial and commercial properties in the area of the subject land of only $4,362 and $8,803, appellant concludes that the rental value determined by BLM clearly does
not constitute fair market value.

Generally, the Board will uphold a BLM appraisal of a right-of-way unless it can be shown either that BLM failed to apply the proper criteria when calculating fair market rental value or that the rental value is excessive. See, e.g., Harvey Singleton, 101 IBLA 248 (1988); B & M Service, 48 IBLA 233 (1980). In the latter instance, an appellant is normally required to submit another appraisal in order to demonstrate that the rental

value is excessive. See, e.g., Mesa Broadcasting Co., 94 IBLA 381 (1986); James W. Smith, 46 IBLA 233 (1980).

In the present case, BLM determined the fair market rental value of the subject right-of-way using the comparable lease method of appraisal. This is the preferred approach. American Telephone & Telegraph Co., 77 IBLA 110 (1983). BLM specifically relied on the actual rentals charged for comparable communications site leases in the vicinity of the subject right-of-way, adjusting for any differences between the leases and the right-of-way.

Appellant does not contend that BLM's use of the comparable lease method of appraisal was improper or that BLM improperly selected comparable leases. Nor does appellant contend BLM improperly adjusted for differences between these leases and the subject right-of-way. In addition, appellant does not assert that the rental charges quoted by BLM for the comparable leases are inaccurate.

Rather, appellant simply contends that the rental value is excessive. Appellant has submitted no appraisal of its own, nor has it submitted evidence of the rentals charged for other communications site leases. Instead, appellant relies solely on the purported lack of correlation between the sale values of certain property and the rental value of the subject right-of-way. We have long held that there is no demonstrated correlation between such values.

In American Telephone & Telegraph Co., supra at 120, we dealt with an assertion that a BLM appraisal was inherently flawed because "rental values determined to represent fair market value of a leasehold bore no reasonable relation to the underlying fee value." We noted that the appellant's argument was based on the assumption that there necessarily was a relation between such values. In order for there to be such a relation, however, we essentially stated that there must be a relation between the size of a communications site right-of-way and its rental value. This is necessarily so because the process of converting a rental value to a fee value, in order to achieve a value which can be compared with existing fee values, involves a calculation of the per acre rental value and then a capitalization of that value. If there is no relation between the size of a communications site right-of-way and its rental value, no reliable conversion can be made. The right-of-way simply has no per acre value, rental or sale.

Relying on evidence presented to the Board in American Telephone & Telegraph Co. and in the earlier case of B & M Service, we concluded that "there is simply no direct mathematical correlation between size of a communications site and fair market rental, particularly where the size is
in the subacre category." Id. at 122. In the words of the August 1986 Appraisal Report, at page 7, size "[is not] * * * a factor in the valuation of [communications site] leases." Rather, it is apparent that the rental value of communications site leases is based primarily on what willing and knowledgeable lessees will pay to willing and knowledgeable lessors to obtain desired sites for the intended use. In the case of competition for choice broadcasting locations at mountaintop sites, it is not surprising that communications site leases will have a rental value far in excess

of the underlying fee value for other nominal uses. See Nov. 4, 1974, Appraisal Report at 4. Nevertheless, the resulting rental value is what
BLM could obtain if its right-of-way grant were issued on the free and open market and is therefore what BLM is entitled to recover for its use by a private grantee.

Finally, in attempting to challenge the rental rate, appellant asserts that BLM has no authority to "retroactively" adjust rental rates (SOR at 6). Appellant argues that BLM only has "authority to adjust the future rates whenever a fair market appraisal justifies the change." Id. We disagree. The applicable regulation, 43 CFR 2803.1-2(b) (1985), clearly provided BLM with authority to initially collect estimated rental charges, even over successive years, and then later adjust the charges according to an actual fair market rental value determination and collect those adjusted charges for previous years. Jancur, Inc., 93 IBLA 310, 312-13 (1986). Appellant was notified of this authority in its right-of-way grant by virtue of the language providing for adjustment of estimated rental payments and the incorporation generally of the regulations in 43 CFR Part 2800. Accordingly, even if we had allowed appellant's challenge, we would conclude that BLM properly established the fair market rental value of communications site right-of-way OR-11303 for the first and second years.

[2] Finally, we affirm BLM's decision of December 23, 1986. Under 43 CFR 2803.1-2(e) (1986) (now codified at 43 CFR 2803.1-2(d)) BLM had the authority to take action to terminate a right-of-way grant if a rental charge "is not paid when due, and such default shall continue for 30 days after notice." Herein, the annual rental charges for the first and second years were due prior to October 29, 1985, and prior to the first anniversary date of the grant, October 29, 1986. 43 CFR 2803.1-2(a). However, the amount actually owed had not then been formally determined. Appellant was notified of the amount due by the District Manager's December 1986 decision, which constituted the notice required by 43 CFR 2803.1-2(e) (1986). Appellant's default in the payment of the required rental charges continued
for more than 30 days following appellant's receipt of that notice on December 2, 1986. Thus, we conclude that BLM was authorized to take action to terminate the right-of-way and that requiring immediate payment and holding the right-of-way for termination were proper BLM actions.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal as to BLM's December 1 decision is dismissed, and BLM's decision of December 23, 1986, is affirmed.

John H. Kelly
Administrative Judge

I concur:

Kathryn A. Lynn
Administrative Judge
Alternate Member